In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-875

ROBERT SIEGEL AND ARTHUR VEALS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of an order granting a writ of mandamus compelling a district judge to modify a pre-trial discovery order that violated the Jencks Act and Rule 16(b) of the Federal Rules of Criminal Procedure.

On October 13, 1971, a grand jury in the Northern District of Illinois returned an indictment which alleged that on May 16, 1969 petitioners, along with Robert Buss and three other persons [1] had possessed cigars and contraceptive devices known to have been stolen from a trailer at a Chicago railroad depot, and

[1] Buss and two other defendants, Joseph Pagone and Anthony La Barbera, pleaded guilty. Another defendant, George Beecher, was severed and found guilty after a jury-waived trial.

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part of an interstate shipment, in violation of 18 U.S.C. 659 (count 2) and had conspired to commit that offense in violation of 18 U.S.C. 371 (count 1). On December 20, 1971, petitioner Siegel filed a pretrial motion for discovery which included a request for the government to produce any statements by his co-defendants. On March 24, 1972, after co-defendant Buss had pleaded guilty on February 2, 1972, Judge McMillen entered an order (Pet. App. 5-6) requiring the government to produce "[s]tatements of all defendants which mention Robert Siegel in connection with this case." When the government did not produce any statements, petitioner Siegel, joined by petitioner Veals, moved to dismiss the indictment. At that time the government informed the court that, with respect to co-defendant Buss, it was unable to comply with the disclosure order because Buss would be a government witness at trial and as such—under 18 U.S.C. 3500 (the Jencks Act) and Rule 16(b)—his statements could not be the subject of discovery until he testified on direct examination (A. 4).[2] Judge McMillen, in an order entered April 19, 1972, denied the motion to dismiss. However, on April 24, 1972, the day set for trial, he informed the prosecutor that he would not allow the government to place Buss on the stand if his prior statements had not been given to petitioners (A. 15).

The government petitioned the court of appeals for a writ of mandamus directing Judge McMillen to

[2] "A." refers to the appendix to the government's petition for a writ of mandamus in the court of appeals, which we are lodging with the Clerk of this Court.

vacate his order of March 24, 1972. The court of appeals, on October 17, 1972, granted the writ and directed the judge to modify his order so as to deny petitioners access to co-defendant Buss's statements until he testifies at trial. Petitioners contend that the court below erred in granting the writ. The court below has adequately dealt with this issue and for the reasons set forth in its opinion (Pet. App. 2–4), upon which we mainly rely, it is urged that the petition for a writ of certiorari should be denied.

We add only these further comments. This case does not involve the exercise of discretion by a district judge; rather it involves an unequivocal statute which the court below correctly held governed this case and denied the judge the power to enter the order he issued. Moreover, although the petition for mandamus was directed to the discovery order, the action of the district court which gave rise to the petition for mandamus was the decision to suppress the testimony of a witness because of the government's failure to comply with the discovery order. As petitioner states (Pet. 7):

> When the case was called for trial, the prosecutor stated that the government could not proceed (A. 13–14). The prosecutor stated that he had already filed a Notice of Appeal (A. 14, 32), but "I would like a clarification": Would the government be prevented by the order of April 19, only from introducing the statement itself, or would it also be precluded from introducing testimony relating to the matters contained within such statements (A. 14–15). Coun-

> sel for Siegel pointed out that the statements, standing alone, were clearly inadmissible on any theory. The respondent Judge stated "I would assume" that any witness whose statements were withheld, would not be competent (A. 15). The prosecutor responded, "All right. That was the clarification that I need. Thank you." • • •

Under 18 U.S.C. 3731, a "decision or order of a district court suppressing or excluding evidence," may be appealed by the United States. This case, therefore, does not implicate the Congressional policy against "piecemeal appeals" present in *Will* v. *United States,* 389 U.S. 90, 96, a case involving a discovery order from which no direct appeal could be taken. Here, although styled on application for mandamus, the proceedings below were in substance the same as if the government had perfected the appeal to which it was statutorily entitled.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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